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Codification of Private Law: Scots Law at the Crossroads of Common and Civil law

MARTIN A HOGG

I. Introduction

Scotland is often described as a ‘mixed’ legal system,¹ in which the two most influential mixes have been the Civil law tradition,² mediated through both Roman law and the later *ius commune*, and the Common law tradition, absorbed through application of English case law and through legislative development mirroring (or coupled with) English statutory reform.³ The result has not been a legal system of hybrid rules, half Civilian and half Common law in nature, but rather one where some parts of the law are more Civilian in character (property law, for instance), some more Common law (parts of commercial and securities law, for instance), and some a collection of rules deriving from both the Civil and Common law (contract, delict, and trust being examples). Scots law has a marked fondness for taxonomy and abstract principles, but has also embraced the Common law’s doctrine of judicial precedent, so that development of the common law by the courts takes place within a context of principles which do not derive solely from prior judgments. The nature of the Scottish mixed legal system, and the attractions which both the Common and Civil law offer,

¹ The concept of mixed legal systems is discussed in K Reid, ‘The Idea of Mixed Legal Systems’ (2003) 78 *Tulane Law Review* 5–40.

² In this chapter, ‘Civil’ and ‘Common’ law will be capitalised where what is meant is (respectively) the legal traditions deriving from Roman and English law; ‘civil’ and ‘common’ law will be used without capitalisation where what is meant is (respectively) the non-criminal part of private law and the unwritten law of the land. This distinction is useful in, for instance, making the point that while Scotland is not a pure Common Law system, it nonetheless has a common law (comprising, amongst other things, much of private law).

³ Lord Rodger wrote of an enthusiastic desire among the nineteenth century Scottish mercantile classes for a UK-wide codified commercial law, citing hard-headed commercial pragmatism as the motivation: see A Rodger, ‘The codification of commercial law in Victorian Britain’ (1992) *LQR* 570, 571–572.

place Scotland at a crossroads so far as the issue of codification of the law is concerned. To codify or not to codify? That is the (present) question.

The Scottish legal fondness for taxonomy and principle produced, in the past, a tradition of so-called Institutional Writings (comprehensive attempts to state the law, some of them in quasi-codal fashion), which came to be looked on as authoritative statements of the law, and it continues to generate, in the present day, occasional suggestions that the private law of Scotland would benefit from codification.⁴ Recent dramatic political developments (a devolved Scottish Parliament, the rise in fortune of the Scottish National Party, and a close result in a 2014 Scottish independence referendum) have added a further dimension: a growing sense of national self-identity can often bolster calls for codification, an obvious comparison being the way in which the triumph of nineteenth century French, Italian, and German nationalism led to the adoption of civil codes in each of those nations.

The aim of this chapter is to explore what codification of Scots private law might mean (as well as what it would not), to analyse the merits and drawbacks of any such development, and to assess the practicability and likelihood of such an eventuality. Though any Scottish codification would be unlikely to impact directly on the legal systems of the Common Law world, my analysis of some of the fundamental issues at stake in any codification of Scots law might well prompt reflections in the minds of Common lawyers as to the virtues or dangers of any possible codification of their own legal systems.

II. WHAT IS CODIFICATION?

To begin with, an obvious and basic question presents itself: what is meant by ‘codification’ of private law?⁵ There is no single concept of codification, but in using

⁴ My Edinburgh Law School Colleague, and former Scottish Law Commissioner, Professor Eric Clive was for many years a driving force behind a Scottish Civil Code Project: see further E Clive, ‘The Scottish Civil Code Project’ in H MacQueen, A Vaquer, S Espiau (eds), *Regional Private Laws and Codification in Europe* (Cambridge, Cambridge University Press, 2003) 83–101. That project met with hostility from some practitioners and members of the judiciary, as well as political apathy, and it stalled. Professor Clive subsequently channelled his passion for codification into the Draft Common Frame of Reference project (‘DCFR’)(he was one of the editors of the six volume DCFR).

⁵ The same question might be asked of the criminal law, or other parts of the law.

the term I have in mind a comprehensive (or nearly comprehensive) placing of private law—and I shall focus in this chapter on civil rather than criminal law codification—onto a legislative footing, so that the structure, principles, and rules of the law would all be contained within a single legislative instrument, the Civil Code. So-called codifications of specific parts of Scottish (and UK) civil law⁶ have already been undertaken—this happened most prominently within the field of commercial law in the nineteenth century⁷—though the legislative style of such partial codifications, and the interpretative approach adopted towards the codified statutes so enacted, lies squarely within the traditions of the Common and not the Civil law.

Any future Scottish Civil Code might represent a continuation of this nineteenth century tradition, albeit with the more ambitious aim of being (largely) comprehensive of the entire civil law. However, on the alternative approach I consider in this chapter, codification would not mean simply consolidating all existing statutory law into one vast piece of legislation, and tacking on further provisions to place the remaining un-enacted common law onto statutory form—what I call a “maxi statute” approach—it would aim rather for a Code whose provisions were at a higher level of abstraction, and drafted in a more succinct style, than one finds in existing statutory law, one leaving room for gap-filling and judicial discretion (issues I discuss later). What would be produced would be a new form and style of legislation, inspired by the Civilian tradition of codification. Such a Code might amend and update existing legal rules, though that would not be a necessary feature of any codification.

So, why might one support or oppose codification of the civil law? The arguments for and against require consideration.

III. FOR CODIFICATION

⁶ They have been so called in the long titles of relevant statutes: so, for instance, the long title of the Bills of Exchange Act 1882 is ‘An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes’.

⁷ See, further, Rodger (n 3).

A number of things may be said in favour of a codification of private law (most of them applicable in other common law/mixed legal systems, not just the Scottish legal system).

First, it would clarify currently unclear or ambiguous legal rules, and provide precisely worded and more easily understandable law. This, of course, can be a virtue of legislative enactments in general, and it is not one which can be claimed for codification alone, albeit that the specific style of codification which I propose (see below) would involve more succinct expression of legal rules than one finds in current Common Law style legislation.

Second—and this would follow only from a more Civilian style of codification, not from a maxi-statute approach—it would reduce the overall volume of written law, producing a corpus of civil law which had the virtue of greater brevity. The phenomenon of ever more lengthy statutes is a manifestation of a tendency to over-regulate, deriving from a systemic legislative tendency to attempt to provide for all eventualities in law. The end result is an avalanche of laws, one which restricts personal liberty and can be perceived by individuals as diminishing their overall quality of life. Codification can act as a counter-weight to over-regulation,⁸ because Codes tend both to be shorter documents and to allow for gap-filling by courts.

Third, a Code dealing with all, or most, areas of the civil law would provide a single locus for members of the public, legal practitioners, and courts to discover the law. It would thereby increase ease of access to justice, and remove difficulties legally unqualified individuals face in searching for the law. A Code cannot turn members of the public into legal experts, but it can at least furnish them with a single starting point for understanding their rights, duties, and remedies, in order to apply them to their specific circumstances.

⁸ See A Rahmatian, 'Codification of Private Law in Scotland: Observations by a Civil Lawyer' (2004) 8 *Edinburgh Law Review* 31, 53.

Fourth, the adoption of a Code would provide answers to some important legal issues not currently determined by the law. Scotland is a small jurisdiction,⁹ one in which much of our private law is non-statutory in nature. Some basic rules of the law have yet to be fully settled by the courts (and hence generate a deal of academic disagreement), and, given that only a small number of relevant cases arise in relation to individual issues over time, the determination of the basic rules is a slow process (sometimes helped along by the Scottish Law Commission ('SLC')). This problem is likely to be exacerbated in the future:¹⁰ adjudication and arbitration are taking more cases out of the hands of judges, and recent increases to the monetary limits of the jurisdiction of the (lower) Sheriff Court will mean even fewer cases coming before the (higher) Court of Session and in consequence less binding precedent being created. A dearth of relevant case law inevitably leaves some legal questions unanswered. I have written on a number of occasions about one such issue: the question of whether, following reduction or rescission of a contract, a claim for the return of money or some thing passed under the contract gives rise to a contractual remedy or one lying in unjustified enrichment. It is absurd that we have no clear answer to this basic question of remedial entitlement. A Civil Code could easily remedy this; in the absence of one, we may be waiting indefinitely for a relevant court judgment or any statutory settlement of the issue. Another area where sufficient clarity is lacking is in relation to third party rights under contract (*ius quaesitum tertio*): the current Scottish law rests on old authorities, some of them at odds with each other, so much so that evidence exists that Scottish law firms are recommending the use of English law (with its modern third party rights statute) as the governing law for some sorts of contractual relationships in order to avoid the confused Scots law.¹¹

⁹ The population of Scotland is approximately 5,300,000 which is roughly equivalent to that of Colorado or Minnesota in the USA, and a little less than the Australian state of Victoria.

¹⁰ Of course, at the other end of the scale, matters can be just as problematic. US Common law is drowning in new cases, and the internet has made the problem even worse. It is impossible to cite in litigation even a tenth of the potentially relevant US cases, and it might well be better for those practising law if much of the case law were not publicly available. Too much precedent can be as troublesome as too little.

¹¹ The concerns of the legal profession are documented in a blog post by a Scottish solicitor: see D Mathie, 'Third Party Rights—Scots Law stuck in the 17th Century' (August 2010), accessible at: <http://www.brodies.com/blog/2010/08/26/third-party-rights-scots-law-stuck-in-the-17th-century/>. The Scottish Law Commission is aware of the problem, and will soon be publishing a Report (including a draft Bill) on reform of this area of law. Scottish Law Commissioner, Professor Hector MacQueen, has previously written on the subject of third party rights and codification: see H MacQueen, 'Third Party Rights in Contract: A Case Study of Codifying and Not Codifying' in L Chen and C van Rhee (eds), *Towards a Chinese Civil Code* (Leiden, Brill, 2012).

This is a lamentable state of affairs. A healthy system of private law should have neither holes nor glaring uncertainties in it.

Fifth—and this follows from the first and fourth points—a reduction in unclear issues and the determination of uncertain issues which would follow from codification should reduce the amount of litigation, and therefore provide economic savings over time. By contrast, in the existing legal environment, private parties bear much of the economic burden of law reform, as litigants must pay for judicial determination of disputes relating to a host of uncertain or unanswered legal issues.

Sixth, a Code would reduce the amount of time wasted by academics, practitioners, and courts, in trawling through the vast number of old and often inaccessible case reports, as well as the ever increasing number of new precedents, in an attempt to discover the law¹² or, in the case of some academic publications, to build up a legal arsenal for deployment in argumentation with other academics. I am not alone in my concern that too much academic time is spent in forensic investigation of what the law is, and in writing articles which laboriously trace the correct path of legal development through nineteenth century and earlier case law.¹³ Such endeavours produce great scholarship, but they divert scholarly attention from matters which might otherwise usefully engage it. I have felt increasingly frustrated over the course of my own career by the amount of time I have had to spend in writing articles in which I have tried to argue that particular rules *ought* to be the position in Scots law, or (in my recent scholarship) that certain fundamental words used by our legal system to describe the nature of obligations should mean *x* or *y*. I gaze enviously upon other country's Civil Codes in which these matters are set out in a few lines—no hours of wasted time for academics working on those systems, arguing repeatedly about what the position should be. The problem seems to be even more acute in fully Common law systems: so, even now, there is still a debate about

¹² 'There is so much information – so many undigested cases available at the click of a mouse – that the demand now is for this mass of raw information to be organised. The best way of organising the law is to have a code': Clive (n 4) 84.

¹³ See for instance H MacQueen, 'Invincible or Just a Flesh-Wound: The Holy Grail of Scots Law' (2014) *Legal Information Management* 2, 10: 'Far too often one is left making extrapolations from nineteenth century or earlier cases or drawing upon isolated (and not infrequently unreported) single judge decisions of more recent provenance'.

whether there is, or ought to be, an obligation of unjustified enrichment in the law. Australia is a prime culprit (you will excuse me for using that description) in perpetuating a debate about unjustified enrichment which ought to have been settled a long time ago. One doesn't find German, or French, or Portuguese, or Quebecois lawyers arguing about the basic structure of the law of obligations: it's in the Code.

I have also seen this problem manifested in my work as editor of a journal: all that scholarship produced on matters which could be easily settled in a Code. For instance, the 2015 volume of the *Edinburgh Law Review* contained a very scholarly contribution on the transmissibility of lease conditions to successor landlords.¹⁴ In it, the author had to devote thousands of words to explaining how muddled the law of Scotland is on this subject, before suggesting a new test to determine whether lease conditions transmit, one which will now have to await the right case, and the right well-read advocate, before it can be advanced in court.¹⁵ Justice is not served well by hard to find, old, and often badly decided, case law, nor should academic careers have to be spent dealing at length with problems which could easily be solved by codification. Of course, the other side of the coin is that, if one decides on a solution to a problem for the purposes of codifying it, one better get the solution right (I return to that issue under the arguments against codification below).

Seventh, codification can reduce a tendency for strong judicial personalities to mould the law in their own image. Codification can thus ensure greater consistency in outcome and fewer idiosyncrasies in the administration of justice. Though Common lawyers have a fondness for eccentric and forceful judicial personalities, there is a danger in veneration of the quixotic, pioneering judge. At its extreme, *ad hominem* law-making impedes consistent adjudication and the equal treatment of litigants, integral aspects of doing justice.

Eighth, codification would anchor law-making power more clearly in the realm of the legislature, and would thus have the constitutional virtue of entrenching a

¹⁴ D Haughey, 'Transmissibility of Lease Conditions in Scots Law—A Doctrinal-Historical Analysis' (2015) 19 *Edinburgh Law Review* 333.

¹⁵ The transmission of leasehold conditions has been a topic of continuing uncertainty and academic endeavour: an Edinburgh Law School graduate, Dr Peter Webster, now at the English bar, devoted an entire doctoral thesis to it.

proper separation of powers by reducing the law-making capacity of judges. We live in a democracy not a kritarchy, and codification supports democratic values.

Together, these arguments represent quite an arsenal in favour of codification. Whether they are persuasive must rest in part upon the strength of contrary arguments.

IV. AGAINST CODIFICATION

A number of arguments may be ranged against codification. First, it can be argued that there isn't any real problem with our non-codified legal system (or at least no problem which can't be solved with the judicious use of statutes)—so, why change things? The use of piecemeal statutory development, perhaps building up over time to become (in scope) a Code, might be said to be just as practical a way of tackling some of the problems I have identified with the legal system. The Law Commission of England and Wales is essentially taking this approach with its step-by-step approach to implementation of its suggested draft Criminal Code;¹⁶ a similar approach could be taken with the civil law. This is all true enough, though if we simply aim for a maxi-statute we would not get the kind of Civil Code I have in mind: we wouldn't reduce the volume of legislation produced; we wouldn't get the general structural and overarching elements a Code offers; and we wouldn't move to the Civilian legislative and interpretative culture which a Code would usher in. Common lawyers might be very happy to hear that! But for a mixed system lawyer, these might count as losses.

Second, a problem with codification is that bad rules may be codified with which we are then stuck. Codes tend (sensibly) not to be revised very often—it took around a century to revise the BGB—so if one implements what comes to be viewed as a bad or unclear rule, that will have a long term negative effect on a legal system. Then again, appreciating this problem can be an impetus to ensuring a robust drafting procedure for a Code; moreover, even if they are easier to change, bad statutes sometimes hang around for as long as bad provisions in a Code.

¹⁶ See the Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989).

Third, it is sometimes said that codification would reduce the ability of judges to ‘do justice’ in hard cases. The essence of this concern is that a Code might unnecessarily hamper and restrain a court, requiring it to reach an unjust conclusion in the circumstances of a case because such circumstances had not been considered during the drafting of the applicable rule(s). This is a danger which, in order to be mitigated, would require a combination of the right degree of abstraction of the rules combined with a power given to the judiciary to gap-fill as necessary (this is discussed further at section G below). The danger could not be completely avoided, however, and any recurring problems would require amendment of the Code.

Fourth, the experience of existing codified systems seems to show that some areas of law (such as delict/tort) are sufficiently complex and nebulous to make codification very challenging. How, for instance, does one clearly specify the rules on pure economic loss? Or the essence of vicarious liability? Much of the law of delict/tort relies on the application of the concept of reasonableness (at multiple stages of the delictual/tortious analysis), making the drafting of provisions of a Code a fiendishly hard exercise. One may have to go either for a high level of abstraction, or else for a level of detailed rules that would rob the Code of brevity and ease of comprehension.

Fifth, it could be said that codification (in the full Civilian sense) is not part of our legal culture—adopting it would thus represent Civilian imperialism, distorting the nature of our legal system and failing to respect our indigenous and complex legal culture. This criticism bites more in a purely Common law context, less so in a mixed legal one; however, it is true that codification would represent a dramatic reduction in the Common law element of the mixed system of Scots law, and hence represent a significant legal cultural shift away from the Common law tradition.¹⁷ This is a significant concern, and in order for it to be over-ridden one would need a clear sense that the benefits of a Civilian form of codification were manifest and weighty.

¹⁷ An observation I think justified by the more obviously Civilian feel of legal systems such as Louisiana, Quebec, and Israel.

In order to explore this last point of legal culture more fully, it will be helpful to undertake a brief examination of the legal culture of Scotland from the perspective of past and present codifying tendencies.

V. CODIFICATION IN THE CONTEXT OF THE MIXED LEGAL SYSTEM OF SCOTLAND

I began this chapter with a reference to the ‘mixed’ nature of the Scottish legal system. Much has been written about this, and it is to simplify matters to note only the Common Law and Civilian influences. To be more granular, the mixture contains not just those two elements, but also ancient native law, Nordic law, Canon law, the law of other European systems, and European Union influences (which, given the large dominance of Civilian systems in the EU, can itself tend towards the Civilian). While the Common Law element came to dominate as the major influence from the time of the Union of 1707 onwards, the other older elements have not ceased to exert an influence on the overall character of the legal system and the EU influence is one of growing significance. The Civilian and canonical influences in particular have both contributed to elements of the legal system which are heavily principled in nature and sometimes have at least a quasi-codal nature.

Codification would represent a further development in an already long history of enthusiasm for law reform in Scotland. Admittedly, early attempts at systematic reform of the law did not get very far. So, for instance, Commissions for law reform appointed in the reign of Queen Mary (1542–1567)¹⁸ and King Charles I (1625–1649)¹⁹ failed to produce any law reform. Significantly, one member of the Caroline Commission (of 1649) was James Dalrymple, later Viscount Stair, who became Scotland’s foremost so-called ‘Institutional Writer’.

The tradition of Institutional Writers is a significant feature of the Scottish legal system. These writers constitute a group of legal authors writing between the

¹⁸ This Commission was ‘to issue, syght and correct the lawis of this Realm’.

¹⁹ This Commission was to ‘convene in whatsoever places and at whatsoever times and how often as they shall think fit, and to revise and consider all the laws, statutes and acts of parliament of this kingdom made and enacted at any time bygone, as well as printed as not printed’.

seventeenth and nineteenth centuries some of whose works came to be regarded as authoritative statements of Scots law and, more controversially, as themselves sources of law (and who were thus cited in legal argument alongside precedent).²⁰ Many of these institutional works, consciously named and modelled after Justinian's *Institutes*, can be said to represent an older, quasi-codal tradition in Scots law. In content they sought to be comprehensive statements of either the whole law or sometimes a large part of it (such as the criminal law²¹), and to include structural and definitional elements such as one would expect to find in a Code. Their influence on the judgments of the courts, on the teaching of the law (they usually formed the basis of lectures to law students), and on Scottish legal culture generally, was substantial. Anyone familiar with Stair's *Institutions*,²² Erskine's *Institute*,²³ or (especially) Bell's *Principles*²⁴ (the most code-like of the three) is at an immediate advantage in navigating and understanding a Civil Code. The willingness of the courts and practitioners to come to see them as sources of law demonstrates a receptivity to the concept of a single source from which the law could be read, digested, and applied.

The impetus for codification did not die with the last institutional work (generally considered to be a work of Archibald Alison from 1833): in the late nineteenth and twentieth centuries it transformed into a parliamentary enthusiasm for maxi-statutes intended to embody the entirety of the law in specific commercial spheres. The fruits of this enthusiasm may be seen in legislation such as the Bills of Exchange Act 1882, the Partnership Act 1890, and the Sale of Goods Act 1893.²⁵ These were, it should be noted, statutes of UK wide application: the late nineteenth century enthusiasm for maxi-statutes was an English as well as Scottish phenomenon. However, calls for wider, general codification²⁶ did not succeed.

²⁰ For consideration of their works, see J Cairns, 'Institutional Writings in Scotland Reconsidered' in A Kiralfy and H MacQueen (eds), *New Perspectives in Scottish Legal History* (Glasgow, Frank Cass, 1984).

²¹ See A Alison, *Principles of the Criminal Law of Scotland* (London, W Blackwood, 1832) and his *Practice of the Criminal Law of Scotland* (London, W Blackwood, 1833).

²² J Dalrymple (Lord Stair), *The Institutions of the Law of Scotland* (1st edn 1681; 2nd edn 1693, repr 1981, Edinburgh and Yale University Presses).

²³ J Erskine, *An Institute of the Law of Scotland* 1st ed (Edinburgh, Bell & Bradfute, 1771).

²⁴ J Bell, *Principles of the Law of Scotland* (1st edn 1829; 4th edn 1839, repr 2010 by the Edinburgh Legal Education Trust).

²⁵ See further Rodger (n 3).

²⁶ H Goudy, A Mackay, and R Campbell, *Addresses on Codification of Law* (Edinburgh, Banks & Co, 1893).

In more recent times, there have been signs of continuing enthusiasm for modern mini-codifications. In my own field of obligations law, one may note the very first joint project of the newly formed UK Law Commissions: a joint Scottish-English Contract Code.²⁷ In that specific instance, the enthusiasm for codification did not bear fruit (a result not lamented by some English commentators²⁸), but the more recent (English and Welsh) Law Commission plan for a Criminal Law Code is being slowly fulfilled, step-by-step, through the passage of successive acts which might eventually be formally connected into a single Code.²⁹ In Scotland, a *Draft Criminal Code for Scotland*, privately authored and published under the auspices of the SLC³⁰ as a contribution to law reform debate (rather than an official proposal for law reform), did not progress into any concrete legal reform, but the SLC's current on-going reform of portions of contract law might develop in time into a wider Contract Code, though progress here is at a modest pace.³¹

What of a European Civil Code? The Draft Common Frame of Reference (DCFR) was (and may still be) an early manifestation of what such a Code might look like. English response to the idea of a pan-European Civil Code has been, for the most part, hostile;³² Scottish response has generally been more favourable (a fact not

²⁷ The project ran from 1965–1973. The proposed Code was eventually published (in draft form) in H McGregor, *Contract Code: Drawn up on behalf of the English Law Commission* (London, Sweet & Maxwell, 1994). There is some discussion of the failed Code in H MacQueen, 'Glory with Gloag or the Stake with Stair: T B Smith and the Scots law of Contract' in E Reid and D Miller (eds), *A Mixed Legal System in Transition* (Edinburgh, Edinburgh University Press, 2005) 138, 172.

²⁸ See, for instance, G Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford, Oxford University Press, 2002) 8.

²⁹ The Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989). The Commission has since been producing a succession of consultation documents and reports whose titles begin with the phrase 'Legislating the Criminal Code'. This has been said by the Commission to be in implementation of 'a policy of reviewing areas of criminal law so that one by one they would be modernised, where appropriate, before being assembled into a code' (see <http://www.lawcom.gov.uk/project/legislating-the-criminal-code/> <accessed 28 April 2016>).

³⁰ Published in 2003, and available online at http://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf <accessed 28 April 2016>. For commentary see T Jones, 'Towards a Good and Complete Criminal Code for Scotland' (2005) 68 *Modern Law Review* 448.

³¹ Professor MacQueen tells me that, in his current role as the Scottish Law Commissioner dealing with contract law reform, he hopes to tackle the legal rules surrounding error and illegality, both currently in a lamentably confused state, before his term as a Commissioner expires.

³² Though there continues to be some English support for the more limited goal of an English contract code, with one view being that this may assist in repelling demands for pan-European codification: see A Tettenborn, 'Codifying Contracts—An Idea Whose Time has Come?' (2014) 67 *Current Legal Problems* 273.

overlooked by English commentators³³), a reflection of a mixed legal system culture more attuned to the Civilian tradition. But codification at the European level would obliterate the legal manifestations of local culture which national codes represent,³⁴ and would not be without cultural ramifications: as the historian John Davies has remarked, “[i]n Scotland, the indigenous law was (and is) the corner-stone of the principle of the common citizenship of the entire population”.³⁵ In any event, the likelihood of the DCFR acting as the basis for a pan-European civil code now looks slim (a more limited instrument, harmonising online sales law and perhaps digital content, being a little more likely); if codification is to occur, it is likely to be at the Scottish rather than the European level.

Overall, I think it is fair to say that the Scottish legal tradition is one which has been, and continues to be, more accommodating towards the potential codification of the civil law. Our law has been historically influenced by Roman law, which in the Justinianic period was codified; modern Scots lawyers continue to demonstrate a fondness for principles of law (of varying degrees of abstraction) capable of being encapsulated within Codes; and legal scholars have taken the view that accommodating Scots law within a wider European harmonisation and perhaps codification would not be as challenging as it would for English law, given the existing civilian elements in much of our private law.

VI. WHAT MIGHT A SCOTTISH CIVIL CODE LOOK LIKE?

What would be the content of any Scottish Civil Code? Writing in 2004, Clive proposed that a Scottish Civil Code might be comprised of the following parts:

Part 1 – General

³³ See P Giliker, ‘The Draft Common Frame of Reference and European Contract Law: moving from the ‘academic’ to the ‘political’” in J Devenney and M Kenny (eds), *The Transformation of European Private Law* (Cambridge, Cambridge University Press, 2013) 23, 28, noting the generally positive view towards the DCFR expressed by Laura Macgregor in her 2009 report on the DCFR to the Scottish Government (available at www.scotland.gov.uk/Publications/2009/03/05095249/0 <accessed 28 April 2016>).

³⁴ See Rahmatian (n 8) 55.

³⁵ J Davies, *A History of Wales* (London, Penguin, 1998) 168.

- Part 2 – Natural persons
- Part 3 – Juridical persons
- Part 4 – Unincorporated associations
- Part 5 – Family Law
- Part 6 – Rights and obligations in general
- Part 7 – Contracts
- Part 8 – Unjustified Enrichment
- Part 9 – Delicts
- Part 10 – Other obligations
- Part 11 – Property
- Part 12 – Succession
- Part 13 – Trusts
- Part 14 – Private International Law

This seems a solid basis on which to base a Code, though I want at this juncture to venture some additional details and suggest some (minor) changes.

I would want to ensure that the General Part tackled what I called earlier the ‘structure and principles’ of the law. It would include a statement of what is comprised in the civil law, and of the relationship of the branches of the law to each other; it would also include definitions of fundamental concepts and structural language.³⁶ What about a reference to equity, or good faith? I should have thought that some inclusion of these concepts, and their role in the Code and its application, would be important, though it is likely that much of the definition of the concepts would have to be left to un-codified doctrine and practical development in the work of the courts.

I would place Clive’s Part 6—Rights and Obligations in general—earlier: one needs to know these rules before addressing family law, given that it imposes duties on family members and in so doing gives other family members rights. I would have a separate part on (unilateral) promise, which is after all a distinct obligation in Scots

³⁶ The sort of language I analyse in my forthcoming book *Obligations: Law and Language* (Cambridge, Cambridge University Press, expected 2016).

private law. I would also include a separate, albeit short, part on benevolent intervention (*negotiorum gestio*).

Some parts of our civil law would have, under the present devolved constitutional settlement, to be omitted from a Code, as they are matters reserved to Westminster. Partnership is one which it might otherwise have been desirable to have included in a Code (especially if agency is going to be included, which I suspect it ought to be, somewhere); another is unincorporated associations.³⁷ Company law is currently reserved to Westminster, which it can happily keep, in my view—company law is very complex and detailed, and I think it makes sense to have a UK regime on company law. In any event, even if company law were devolved, one would wish it to be the subject of a separate Corporate Code.³⁸ As the Scottish Parliament takes more powers to itself—as it seems likely to do in a piecemeal fashion over the coming years—some areas currently outside any Code might be brought within it, such as sale of goods³⁹ and consumer remedies.

As for the drafting of the provisions, the aim of what one is doing with a Code in the Civilian tradition, and hence the language used and the interpretative techniques to be applied to it, is not the same as in statutes.⁴⁰ As the Civilian trained Dr Andreas Rahmatian of Glasgow University has written in the *Edinburgh Law Review*: “Scots statutes, both Acts of the UK Parliament for Scotland and Acts of the Scottish Parliament, are unadulterated Common Law creations in respect of their drafting style, level of abstraction, and regulatory detail, and, due to their nature, they are

³⁷ The SLC’s Report on *Unincorporated Associations* (Scot Law Com No 217, 2009) remains unimplemented at the present time, such implementation requiring UK Government action. I am informed that the SLC made representations to both the Calman (2007–2009) and Smith (2014–) Commissions that both partnership and unincorporated associations should become devolved areas, but these overtures have not as yet borne any fruit.

³⁸ The same could be said of intellectual property law, which is the subject of a separate code in France (1992, with later revisions).

³⁹ With an ongoing attempt to harmonise sales law at a European level (see the proposed Common European Sales Law), there might well be opposition to devolution of sales law if there were any danger of that creating different law in Scotland and England. The business community would be likely to have strong objections to any differentiation in Scottish and English sales law beyond the present minor differentiations in the UK Sale of Goods Act 1979.

⁴⁰ This has been commented upon in the past by the Law Commission of England and Wales (‘Codification, as we see it ... calls for the embodiment of the law in one or more statutes of a type different from the British pattern’: *Seventh Annual Report* (Law Com No 50, 1971–2), para 3) and by the Scottish Law Commission (‘Parliamentary draftsmen in future may sometimes be called upon to alter radically their style of presentation when the subject matter is considered appropriate for codification’: Scot Law Com No 28, 1973, para 10).

arguably not appropriate as a basis for a successful codification.”⁴¹ That strikes me as undoubtedly the case.

A number of challenges would present themselves, including the treatment of parts of the law having a mixed private/public nature (Clive has previously mentioned the example of the law on adults with incapacity⁴²), and of matters which it is difficult to locate in any one branch of the law—take, for instance, the matter of the regulation of termination of pregnancy (assuming that this area of law is eventually devolved to the Scottish Parliament, as some wish it to be): would a provision on this matter go into a Civil Code? It is a subject partly about family law rights, partly about personality rights, and partly about medical law—would it qualify as a civil law issue and thus go into any Civil Code? There is no obviously correct answer.

What also about EU law of a private law nature? One evident problem relates to EU Regulations: these are directly applicable law within member states and cannot be reproduced in provisions of national law. So, anything that is the subject of a Regulation in EU law could not appear within a national civil code. This means, for instance, that those jurisdictional matters which are the subject of EU Regulation—such as the so-called ‘Brussels II bis’ Regulation,⁴³ which determines which court has jurisdiction in matrimonial matters—could not go into a Civil Code. Other examples of Regulations of a procedural nature exist.⁴⁴ However, as such Regulations concern procedural matters, this should not be problematic for any Code, as one would not wish, I think, largely procedural matters to go into a Civil Code in any event; matters of substantive rather than procedural EU law tend to be left to EU Directive, allowing them to be implemented in national law and hence in any Civil Code if that were thought appropriate.

⁴¹ Rahmatian (n 8) 35.

⁴² Currently found in the Adults with Incapacity (Scotland) Act 2000. The Act has a public law aspect, in that it provides for the office of a Public Guardian to oversee the system of powers of attorney over incapable adults.

⁴³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

⁴⁴ For instance, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

It would be possible to incorporate into a Civil Code existing maxi-statutes having a civil law nature, though as many such statutes have a mercantile or company law nature one would probably wish to leave those to a separate Commercial or Company Code. If existing statutes were to be incorporated into a Civil Code, some alteration to their provisions might well be necessary to give them the higher level of abstraction consistent with the nature of the Code I have in mind. This leads me on to the more general question of the extent to which one would wish to use the process of codification as an opportunity to reform existing areas of law (whether existing statute or common law). Doing so would permit much desirable legal development, but it would slow down the process of codification. The alternative would be adopt a Code which one might already foresee as requiring amendment at a later (perhaps not too distant) date. In pondering this issue, it must be admitted that some parts of existing private law could clearly do with improvement, and not just the common law. For instance, and again to return to a contribution in the 2015 volume of the *Edinburgh Law Review*, Dr James Goudkamp has written⁴⁵ of the uncertainty surrounding the apportionment of blameworthiness under section 1 of the Law Reform Contributory Negligence Act 1945: as the UK Supreme Court case of *Jackson v Murray*⁴⁶ shows, the lack of clarity in the Act as to whether apportionment is based upon causal potency, relative blameworthiness, or perhaps some additional factors, continues to create problems for the courts and to give rise to differing judicial approaches. The matter could be resolved with a relatively short additional provision in any Code. But would such addition require lengthy consideration and consultation before it were affected? That is certainly the existing Law Commission model of law reform, and it is very doubtful that one would wish to by-pass such a consultation before implementing any reform in a new Code. Multiply that one issue many times, and the task of updating more than a few relatively uncontroversial rules before codifying it would be an impractical exercise if it were hoped to achieve codification on anything other than a long term timescale. This issue of possible reform before codification is one issue among a larger collection that can be gathered together under the broad question which forms the heading of the next section of this chapter.

⁴⁵ J Goudkamp, 'Apportionment of Damages for Contributory Negligence: Appellate Review, Relative Blameworthiness and Causal Potency' (2015) 19 *Edinburgh Law Review* 367.

⁴⁶ [2015] UKSC 5.

VII. HOW PRACTICAL WOULD CODIFICATION BE?

The questions surrounding the practicalities of any codification of private law (and these relate to any system considering such a development, not just Scotland) are numerous.

A. Support/opposition to codification

First, there is the question of support for, or opposition to, codification. It has been said that the various branches of the legal profession have traditionally been opposed to any suggestions of codification. Opposition has been reported among some members of the bench,⁴⁷ though that may be changing over time. As to the bar/solicitors, Clive reported a ‘mixed’ view, while adding that ‘there is a tide flowing in favour of codification’. It would be hard to assess the current accuracy of that characterisation in the absence of any recent data of which I am aware concerning opinions in the legal community at large. What of the view of legal academics? Again, Clive commented that opinion among legal academics ‘appears to be mixed’.⁴⁸ From my own informal conversations with colleagues, that would still seem to be an accurate representation of academic opinions in 2015, although (significantly I think) a number of those who have had personal experience of law reform work have come to adopt strongly or moderately pro-codification views.⁴⁹ Going beyond the legal profession, an interest might be taken in codification by some pressure groups and

⁴⁷ Rahmatian (n 8) 56, cites the negative view (given in 2001) of codification of the then Lord President Rodger, while noting that this appears to have proceeded from the assumption that any Code would follow the traditional Common law drafting.

⁴⁸ Clive (n 12) 85.

⁴⁹ See, for instance, former Law Commissioner G Gretton, ‘Of Law Commissioning’ (2013) 17 *Edinburgh Law Review* 119, 132 (‘on balance, I think the arguments of the codifiers are better’); former Law Commissioner, K Reid, ‘Scots Law and its Edinburgh Chair’ (2014) 18 *Edinburgh Law Review* 315–340, who welcomes the increasing incursion of legislation into private law, calling it ‘virtual codification by stealth’ (339); and current Law Commissioner Professor Hector MacQueen (n 13) at 10, who, in musing on a specific possible statutory clarification of an existing aspect of Scots contract law, remarked that ‘[i]n some ways it could be politically more straightforward to put the matter on the legislative agenda of the Scottish Government and the Scottish Parliament as part of a larger and more ambitious scheme such as a contract or more general private law code ...’. A more non-committed and open-minded view is adopted by current Commissioner Dr Andrew Steven, who remarked in a paper delivered at All Souls College, Oxford, in 2014 that ‘I consider that as a Law Commissioner it is my responsibility to keep codification under active consideration’ (‘Codification: A perspective from a Scottish Law Commissioner’).

similar organisations keen to promote legal reform. It is hard to predict specific opinions among such bodies, though I should have thought that a clear, single statement of the law would have been welcomed by most groups with an interest in civil justice.

Crucial in any movement for codification would be political support. Is there any? Clive reported in 2004 that his attempts to persuade the Scottish Government to advance the Civil Code Project had not been successful. In September of 2015, I made overtures to the Scottish Secretary for Justice, Michael Matheson MSP, a scientist by training rather than a lawyer (which I imagined might have been a good thing so far as advocacy of codification is concerned), enquiring as to possible Scottish Government interest in a Civil Code. The response was a letter to me from the Justice Directorate expressing the view that the preparation of a Civil Code would be a “significant undertaking” requiring “substantial resources”, that the Government did not routinely receive any correspondence about a Code or calls asking for one to be implemented, that there was “no clear consensus about codification” but rather “strongly divided views amongst the legal profession”, and consequently that the Government was not considering the introduction of a Civil Code.⁵⁰ It is striking that there was no mention in this letter of any of the matters which I suggested earlier might favour the introduction of a Code.⁵¹

It seems then that, at present, the Scottish Nationalist administration, having other legislative priorities,⁵² is no more receptive to the idea of codification than Clive found the Labour-Liberal coalition to be at the turn of the new millennium. Whether the Government might be prevailed upon to change its view by further lobbying seems doubtful. I suspect that wider public support would be needed to bolster any such lobbying.

⁵⁰ Letter from Jill Clark of the Scottish Government’s Justice Directorate, Civil Law and Legal System Division, dated 13 October 2015 (ref 2015/0031302).

⁵¹ One might speculate that this exemplifies an attitude noted by former Law Commissioner, Professor George Gretton (n 49) 132: ‘Tell [politicians] that the law needs to be made simpler, more accessible and more coherent and they look bored’.

⁵² The result of the increased devolutionary responsibility which the new Scotland Bill, currently going through the UK Parliament, will bring to the Scottish Parliament (including increased taxation and welfare powers and responsibility) may mean less Parliamentary time for existing responsibilities, including reform of private law.

What then of any such public support? Clive's assessment was that "there is not currently a perceived need for codification ... There is no demand from the general public".⁵³ However, even though he thought there to be no demand as such (which would seem still to be the case, if the Government's mention in its letter to me of a lack of public interest may be taken as accurate), he suspected that the public would favour codification were it to be on offer, given that the public already appeared to prefer statute to case law (a preference suggested as resting upon the relative ease of discovering the law from statutes).⁵⁴ I think that was (and remains) a fair assessment. The public does, I suspect, prefer legislation because it is easier to read and because direct public access to court judgments from before the early 1990s is very difficult; there is certainly a steady stream of public petitions to the Scottish Parliament⁵⁵ asking for legislative reform of areas of the law. The public might then be brought on side, but it is challenging to see how sufficient public interest could be generated, short of either identifying a Parliamentary champion or else starting and finding support for a public petition for a Civil Code.

B. Preparatory steps and implementation

If sufficient support could be generated among the public, and in the political and legal worlds, to enable a Civil Code project to be advanced, a number of facilitative matters would require consideration.

Would public consultation form part of the process of forming the draft content of the Code? To a large extent, that would depend upon whether the plan were largely just to replicate the existing law (in which case, consultation might extend to no more than whether the idea of codification was a good one) or whether the opportunity would be taken to reform parts of the law (in which case consultation would have to be more extensive, both in scope and likely timescale).

⁵³ See E Clive, 'Thoughts from a Scottish Perspective on the Bicentenary of the French Civil Code' (2004) 8 *Edinburgh Law Review* 415, 418.

⁵⁴ Clive (n 12) 86.

⁵⁵ The business of the Scottish Parliament's Public Petitions Committee may be accessed here: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29869.aspx>.

Who might oversee the task of drafting a Civil Code? Such a task would be too large for Parliament to attempt. In theory it could be done by the SLC. However, the sheer scope of the task would likely necessitate dedicating the entire work of the Commission to the project for a number of years, which might well be thought undesirable given the resultant neglect of other potential areas of law reform which would result. I strongly suspect therefore that the first step in any Civil Code project would be for the Government to pass legislation establishing a dedicated Civil Code Commission ('CCC'), to whom would be given the task of overseeing the entire project from beginning to end (the end being the presentation of the final draft text of the Code to Parliament for implementation). The CCC would ideally be composed of fifteen to twenty members, comprised of a mixture of legal practitioners, academics, members of the judiciary, perhaps select representatives of the wider public or interested groups,⁵⁶ and maybe even individuals from other legal jurisdictions with prior experience of drafting civil codes. There would be a chairperson, perhaps either a senior academic or a senior judge, the work for this person being likely to extend to a full time or near full time commitment. There would also have to be a secretary to the CCC, whose job would be to arrange its meetings, take minutes of proceedings, and deal with any correspondence and media work. Dedicated, full-time legal researchers might also be thought desirable (they are certainly a necessary and invaluable part of the work of the SLC). Dedicated physical premises might not perhaps be needed, as the CCC members could meet in rooms provided by the Scottish Parliament, Government, or SLC. The task of drafting could conceivably be undertaken by Scottish parliamentary counsel, following instructions (and perhaps tentative drafting) by members of the CCC, but expertise might have to be sought from those more familiar with drafting Civilian style legal instruments.

As the first task of the CCC, policy directions might have to be sought from Parliament (as happened in the Netherlands before the 1947 revision of its Civil Code⁵⁷) in order for a clear steer to be given by the legislator on major policy issues affecting the content of the Code. To the CCC would fall the job of undertaking any necessary consultations with the legal profession and the wider community;

⁵⁶ For instance, Citizens Advice and similar groups with an interest in the law.

⁵⁷ Fifty questions were posed to the Dutch Parliament by Professor E M Meijers, to whom the tasking of overseeing the revision had been entrusted: see further J Dainow, 'Civil Code Revision in the Netherlands: the Fifty Questions' (1956) 5 *American Journal of Comparative Law* 595.

comparative research on other civil codes; and discussion and settlement of policy details not subject to parliamentary direction. The task of preparing preliminary drafts of different parts of the Code could be allocated to CCC members with expertise in the specific field in question.

How long would the work of the CCC last? The first draft of the German Civil Code took about fifteen years to produce, after which the draft was rejected; a revised draft took a further eight years. In the Philippines (a mixed legal system like Scotland), a Civil Code Commission formed in 1947 led to the adoption of a Code five years later. In Scotland, given that a Civil Code would be an entirely new enterprise, it is hard to envisage the task taking less than ten years to complete. Being more precise than that is difficult: the time to be taken for debates over policies and over potential drafting difficulties are two variables which it is hard to assess. I can conceive of the possibility of the Code being brought into effect in stages, though that would be a less preferable route: staged implementation would make it more difficult, though not impossible, to include cross-referencing between parts of the Code (e.g. between the obligations and property parts) given that any such cross-referencing might be to parts of the Code which would not yet be in effect. Other systems have codified piece by piece,⁵⁸ or revised in such a manner, so I wouldn't wish to write off such an idea for my own system, but given the Civilian drafting and interpretative methodology I propose, any staged implementation ought not simply to be a succession of maxi-statutes in the traditional Common law mould.

Once a Code were adopted, any subsequent reform would also take some time: the Civil Code Reform Commission of France was formed in 1945, the first part of its definitive draft not being presented until eight years later;⁵⁹ in Louisiana, things moved a little more quickly: its revised Civil Code of 1870 took two years to draft and promulgate.⁶⁰ One would hope that, however long it might take, any revision of a

⁵⁸ This was the path taken by another mixed legal system, Israel: see further E Zamir, 'Private Law Codification in a Mixed Legal System—The Israeli Successful Experience' in J C Rivera (ed), *The Scope and Structures of Civil Codes* (Dordrecht, Springer, 2013) 233. Zamir talks (235) of an Israeli process of 'codification by installments', one which led ultimately to the gathering together of the various enactments (drafted in a Civilian way) into a single draft Civil Code (currently still making its way through parliamentary procedure).

⁵⁹ See J Dainow, 'Preliminary Report of the Civil Code Reform Commission of France' (1955) 16 *Louisiana Law Review* 1.

⁶⁰ See A Yiannopoulos, 'The Civil Codes of Louisiana' (2008) *Tulane Law Review* 1.

Scottish Civil Code would not have to occur for some considerable time. This would be dependent on legislators resisting the urge to tinker with the Code in the way that they tend to tinker with ordinary statutes and subordinate legislation, something that would require a cultural shift on the part of legislators, and a supreme effort to ensure that the text of the Code as adopted had been fully considered and carefully drafted. Inevitably, there might be periodic minor amendments to implement any changes necessitated by EU Directives.

As to likely costs associated with the CCC, I think we can envisage costs in the several hundreds of thousands of pounds (likely in the upper range). The chairperson would require to be salaried, as would the secretary (and any researchers); other Commission members would have their expenses met, and perhaps even receive an honorarium, but would not I think be otherwise remunerated. This represents only my vague impression of likely costs; a more detailed budgetary costing would have to be undertaken.

C. Challenges for the adoption and application of a Civil Code

I have mentioned already some challenges relating to the potential content of any Civil Code (including how to deal with content having a mixed public-private nature, and problems caused by EU regulation of areas of private law). Some other challenges would present themselves to the CCC and to courts interpreting and applying the provisions of the Code, among them the following:

- (a) *A change in drafting culture.* As mentioned earlier, a Code (as I envisage it) would not simply be a very long statute. Careful thought would have to be given to the level of abstraction of the provisions of the Code; the existing British style of statutory drafting, which is to be as comprehensive as possible once the scope of the intended provision has been determined, would be inappropriate. Some existing Codes approach certain questions at (to my mind) too high a level of abstraction: one example with which I suspect others will agree is the very truncated section on delict in the French Civil Code, a mere five articles. The consequence is that much has had to be left to the courts to work out, including matters that really should have been in the Code itself.

- (b) *A change in interpretative culture.* It has been said that in Civil Law countries, the “rules of construction allow for more interpretative flexibility”, the canon of construction comprising “the literal (or grammatical) interpretation, the systematic (or systematic-logical interpretation), the historical interpretation, and the objective- teleological interpretation”.⁶¹ Judges steeped in the Common Law tradition of interpreting statutes would require to undergo a change in mind-set if such a broader approach were to be adopted in relation to a Scottish Civil Code.⁶² The challenge of achieving this change of mind-set should not be underestimated: Justice James Dennis, formerly of the Louisiana Supreme Court and now of the US Court of Appeals for the 5th Circuit, has remarked of the Louisiana legal system that “our courts have not adequately developed distinct techniques for interpreting and applying the civil code and dealing with judicial precedent in that process”.⁶³ If that can be said of Louisiana almost two hundred years after the introduction of its first Civil Code, then the process of developing in any post-codified Scottish legal system the necessary Civilian cultural mind-set might also be a lengthy one, given an existing Scottish legal environment in which (as in Louisiana) the Common law has been a strong counter-influence to the Civil Law.
- (c) *Settling the answers to big issues of principle before beginning the drafting process.* There are important structural and doctrinal questions which determine the shape and content of the civil law in any jurisdiction; such questions would have to be settled before any drafting of the provisions of a Civil Code could commence. Such issues include: whether the system of property law is to be abstract or causal; whether concurrent liability in the law of obligations is to be permitted, and under what conditions; whether the harm in delict/tort is to be conceived of as a loss or interference with rights, or as injury traditionally conceived in physical and economic loss terms; whether unjustified enrichment is a subsidiary entitlement in obligations law, only available in the absence of other remedies; whether (to stick with unjustified enrichment) loss is always a pre-requisite for a claim, or only with certain types of claim; whether there is to be a

⁶¹ Rahmatian (n 8) 52.

⁶² It has been suggested that this might be ‘one of the biggest stumbling blocks’ to codification, albeit that there is some familiarity with civilian interpretative trends and techniques because of EU law: see Rahmatian (n 8) 53.

⁶³ J Dennis, ‘Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent’ (1993) 54 *Louisiana Law Review* 1, 1.

general action for the redress of unjustified enrichment, or a number of actions. These are only a few examples (culled mostly from my own field) of a host of structural and doctrinal questions which would need to be answered before drafting could begin. These are the sorts of questions on which public consultation would be of limited use, given their heavily doctrinal nature; some practitioner input might assist, as pre-eminently would that of the academic community. But, as I suggested earlier, the CCC might also choose to seek parliamentary guidance on some of these issues. Doing so is likely to ease the approval of a draft Civil Code by Parliament.⁶⁴

To some eyes, the practical challenges in implementing a Civil Code would be too great. That is not my view, but I understand the concerns. If codification were not pursued, would there be any half-way house? One could of course, without adopting the changes to drafting and interpretative culture I have mentioned, and without implementing a single instrument, over time pass a number of large statutes, using a common framework of concepts and terminology,⁶⁵ which together could aim to place the entirety of private law on a statutory footing. Doing so would however be to continue the tradition of over-regulation which is a feature of the modern law; moreover such large statutes cannot realistically be said to present the law in an accessible form. Other possibilities also present themselves: wider European codification (unlikely, I think) or harmonisation (more likely),⁶⁶ national restatement, and consolidation (underused these days, due to other pressures on parliamentary time).

What Scotland may choose to do is not necessarily what other systems may choose to do. Some of the practical considerations which I have ventured to suggest would arise in any plans for Scottish codification would be likely to arise in other systems (including, of course, questions of potential political and legal support). Admittedly, however, in any likely drive for codification in fully Common law systems it is almost unthinkable that the type of codification proposed would involve

⁶⁴ Though, over a five to ten year drafting period, one cannot discount a change of policy view in a legislature.

⁶⁵ Clive suggested this as a serious possibility: (n 53) 418.

⁶⁶ One the various possibilities at European level, see J Devenney and M Kenny (eds), *The Transformation of European Private Law* (Cambridge, Cambridge University Press, 2013).

the change in drafting and interpretative culture I have suggested for Scotland; even more unlikely would be the possible abandoning of the doctrine of precedent which I am about to discuss.

VIII. WHAT SHOULD HAPPEN TO THE DOCTRINE OF PRECEDENT?

The use of case law to explain and develop the law has its proponents and opponents. Opponents argue that justice is not well served by sometimes hard to find, old, and occasionally badly decided, case law; proponents laud the flexibility that careful, measured development of the law through judicial decision offers. Whatever the merits or drawbacks, simply keeping the doctrine of precedent as it is, and applying it to a future Civil Code, would not be an option, unless what was called a Code were merely to be a maxi-statute, which I have argued it ought not to be. The doctrine of *stare decisis* is incompatible with Civilian style codification:⁶⁷ partly for the reason (explained more fully in the next paragraph) that civilian methodology does not see case law as a *fons juris* (source of law), whereas *stare decisis* does (whether as a primary or secondary source may be argued), and partly because *stare decisis* is too limiting in its focus on the existing corpus of decided cases (by contrast, Civilian judicial methodology takes in, as also explained in the next paragraph, consideration of the values and principles of the relevant Code).

One approach, if Scots civil law were codified, would be to adopt the methodology of the Civil Law in relation to prior judgments, what is styled in French law (and other systems, including Louisiana) the doctrine of *jurisprudence constante*. Under such an approach, a previous judgment plays ‘only a supporting role’,⁶⁸ the Code itself being the primary source of law. So, for instance, taking this approach, Article 1 of the Louisiana Civil Code states that ‘[t]he sources of law are legislation and custom’, Article 4 adding that ‘[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity’. Under these Articles, case law is noticeably absent as a source of law, not being mentioned even as a secondary source. So what role does case law play under the

⁶⁷ That would not be to preclude its continued use in areas of law which were un-codified.

⁶⁸ Dennis (n 63) 3.

doctrine of *jurisprudence constante*? The answer is that prior cases may serve as persuasive examples of the proper application of the law. In order to function this way, a case needs to ‘illustrate that the judge followed sound legal methodology in interpreting the law and applying it’.⁶⁹ A part of such sound methodological approach involves making a decision which adheres as closely to the values of the Code as possible—this is the context within which the understanding of ‘equitable’ in Article 4 of the Louisiana Civil Code is to be understood. When a methodologically sound decision is identified and begins to be followed in later judgments, there develops a body of judgments treated as persuasive and styled *jurisprudence constante* (as representing, over time, a consistent approach to application of the law).⁷⁰

This all sounds well and good, yet Judge Dennis has said of the doctrine of *jurisprudence constante* as it applies in Louisiana that ‘there has been little articulation of theory or methodology by which a judge can determine how influential a previously decided case should be in a subsequent case under the Civil Code’.⁷¹ By way of contributing to the development of an appropriate theory, he has argued for a tripartite methodological approach,⁷² based on three ideas: (i) logical subsumption—that is, the need to apply an outcome determined by the Code if the circumstance at hand is subsumed with a codal rule; (ii) analogy—appropriate in those cases of gap-filling where the same competing interests have been regulated under another rule, and an analogical extension of the rule may thus be justified to the circumstances of the case; and (3) ‘rulemaking’—appropriate in two cases, first where the Code itself refers a matter to the judge’s own judgment, and second in those gap-filling cases where no analogy can be drawn. In such rule-making decisions, however, the judge must still (as mentioned earlier) take account of the values and principles of the Code so that any judicial assumption of the legislative mantle should occur, in theory, within a tightly circumscribed sphere.

Whether this specific tripartite classification of the desirable Civilian methodology is accurate or appropriate is open to debate. But it is unarguable that

⁶⁹ Dennis (n 63) 3.

⁷⁰ The dynamics of legal evolution under systems using *stare decisis* and *jurisprudence constante* has been compared: see V Fon and F Parisi, ‘Judicial Precedents in civil law systems: a dynamic analysis’ (2006) 26 *International Review of Law and Economics* 519.

⁷¹ Dennis (n 63) 2.

⁷² Dennis (n 63) 8–14.

some sort of appropriate methodology would require to be developed in Scotland to guide judges on the correct use and application of prior case law if the doctrine of *stare decisis* were to be abandoned in favour of a *jurisprudence constante* approach. In this respect, though civil codes do not commonly specify within their own provisions how prior case law is to be used, a rule could in theory be included in any proposed Scottish civil code. Such a provision might state something like the following:

1. No judgment of a court applying or interpreting the provisions of this Code shall bind a court in any subsequent judicial deliberations.
2. Nonetheless, a consistent application or interpretation of the provisions of this Code in relation to any matter arising under it may [perhaps 'shall?'] be considered persuasive by a court.

Any such provision would inevitably involve a degree of uncertainty: it would, for instance, be impossible to specify just how *constante* a series of judgments would have to be before becoming persuasive, or indeed the degree of persuasiveness attaching to any such series of decisions (perhaps, in practice, increasing in a degree commensurate with the volume of the prior consistent case law).

Following codification, if the doctrine of *jurisprudence constante* were to be adopted, references to comparative case law, especially to English case law, would be likely to be largely confined to any gaps in the Code in relation to which it was thought that rulemaking was appropriate; even then, any comparative case law would need to accord with the values and principles of the Code. In recent years one of the great joys for British comparative lawyers has been the increasing use of judgments from other jurisdictions by Scottish and English courts. Would this beneficial comparative influence therefore be lost? I doubt it. References to comparative jurisprudence have typically featured in two sorts of circumstance: (1) where judicial law reform has been thought desirable (e.g. in abolishing the error of law rule in mistaken payment cases)—comparative law would presumably serve this role *at the stage of drafting* a Civil Code; (2) where courts have sought to fill gaps in the law—as explained above, gap-filling is considered one aspect of the civilian methodological

approach to prior case law, so comparative law would continue to play a role in cases of this sort in a codified system. In short, if *jurisprudence constante* were to be chosen over *stare decisis*, I don't believe that we would lose the wisdom of the comparative Common (and Civilian) law which has been so important in the development of the jurisprudence of a small legal system like Scotland.

IX. COMPARATIVE CODIFIED MODELS

In drafting a civil code, a CCC would of course have a wealth of comparative civil codes on which to draw when considering the structure, style, and content of any Scottish Civil Code. Modern Civilian codes (such as the new Dutch Civil Code, and recent East European Codes) are very likely to be thought useful comparisons, albeit most likely in translated form; one would also expect that the Codes of other mixed legal systems would be important sources, especially where (as in the case of Louisiana) the system in question is an English language one.

What of the use of Common Law codes for comparative drafting purposes?⁷³ The so-called 'codification' of parts of UK commercial law in the nineteenth century has already been noted. This 'codification' was largely a putting into statutory form of the common law without the adoption of an evidently Civilian style in drafting, though in some of the statutes passed (such as the Bills of Exchange Act 1882) the brevity in expression comes close (and may in places even reach) what one would be looking for in a Civilian style Code. So some repetition of such existing law could feature in any Civil Code. Additionally, since the passage of the Law Commissions Act 1965, the Law Commission of England and Wales and the Scottish Law Commission have been required under the Act to concern themselves with 'systematic development and reform [of the law], including in particular *the codification of such law*' (emphasis added).⁷⁴ What examples of this exist? The on-going step-by-step codification of English criminal law has already been mentioned, but in the civil law

⁷³ For a comprehensive historical survey of codification movements in the Common Law world, see G Weiss, 'The Enchantment of Codification in the Common-Law World' (2000) *Yale Journal of International Law* 435.

⁷⁴ Law Commissions Act 1965, s 3(1).

sphere there is only a limited pool of such codification upon which the CCC might draw for inspiration.

In other parts of the Common Law world, there are what are styled ‘civil codes’, for instance the California Civil Code. The tone of that instrument (and of similar instruments) is however largely that of a maxi-statute, and is unlikely to be of much assistance to the CCC. Australian Government plans for a Contract Code⁷⁵ have stalled, so there appears (so far as I can see) to be no code-like Australian legislation in the civil law sphere upon which Scots drafters might draw; Australian criminal law is another matter, and both state and federal criminal law is developing in a codified direction.⁷⁶

The SLC has already, in prior Discussion Papers and Reports, drawn on model law instruments such as the PICC, PECL, and DCFR, and it is highly likely that a CCC would also take into account such model instruments in its deliberations on a draft Civil Code. The SLC’s willingness to draw on these model codes has been replicated by law reformers in other European legal systems: so, for instance, the contractual rules within the new Estonian Law of Obligations⁷⁷ (adopted in 2002⁷⁸), a law constituting one of the five connected parts of its Civil Code, were modelled largely on the rules found in the PECL, and the Belgian Pledge Act of 11 July 2013 which is heavily influenced by the DCFR Book IX.⁷⁹

To what extent a CCC might want to produce a draft instrument which, in modelling itself more on the *content* of the PECL and DCFR, would further ‘civilianise’ Scots private law is an interesting question. It is one which would raise a number of considerations, among them the proposed timescale for completing the

⁷⁵ Discussed by W Swain, ‘Contract Codification in Australia: Is it Necessary, Desirable, and Possible?’ (2014) 36 *Sydney Law Review* 131. Not all Australian commentators are anti-codification: for a positive view, see for instance D Svantesson, ‘Codifying Australia’s Contract Law – Time for a Stocktake in the Common Law Factory’ (2008) 20 *Bond Law Review* 1.

⁷⁶ Some Australian states have Crimes Acts, which list varieties of criminal acts without exhaustively treating of their content. At the federal level, the Crimes Act 1914 and the Criminal Code Act 1995 represent a concerted movement in the direction of codification.

⁷⁷ Available at <https://www.riigiteataja.ee/en/eli/506112013011/consolide> <accessed 28 April 2016>.

⁷⁸ And since somewhat revised to take account of subsequent EU Directives.

⁷⁹ I am grateful to Dr Andrew Steven of the Scottish Law Commission for drawing this example to my attention. The new Belgian Act is discussed in E Dirix, ‘The New Belgian Act on Security Interests in Movable Property’ (2014) *International Insolvency Review* 171.

project: greater adoption of PICC, PECL or DCFR rules would greatly increase the need for consultation and the burden of the preparatory work of the CCC.

X. CONCLUSIONS

By way of conclusions, let me make a few remarks under three headings relating to the kind of codification I have been considering: desirability; practicability; and attainability.

In terms of desirability, I have argued that codification within the Civilian tradition is, on the whole, a desirable thing for the small, mixed legal system of Scotland. A number of benefits would accrue, among them clarification of currently confused areas of the law; the filling in of gaps in our existing jurisprudence; and reversal of the current trend to over-regulation and legislation. Ultimately, the most convincing argument for codification in all currently un-codified legal systems, including Scotland, is a legal-political one: codification would bring the law closer to the public, making it more accessible and encouraging a greater sense of individual participation in the legal order. So, the heart of my argument rests on a justification which is not merely a legal but also a politico-governmental one.

In terms of practicability, I have argued that the task of codification of the civil law could be achieved in the medium term, assuming the necessary support from both the legal and political spheres. Completion of the project would come with a reasonably substantial price tag, but the positive results would have an enduring economic value. There would be policy and drafting challenges, but no more so than in other systems which have codified their law, and the drafting Commission could draw on the comparative codification experience of other legal systems. The adjustment of legal culture which would require to follow the style of drafting I have proposed, and the shift to a system of *jurisprudence constante*, would present the greatest challenges, but it should not be forgotten that we already live with a history of quite dramatic changes in legislative drafting style, and that we did not have a system of *stare decisis* before the emergence of accessible, printed law reports.

Finally, in terms of attainability, it must be admitted that there is an absence of any interest in a codification project in the present Scottish Government, that views in the legal community are mixed, and that it is not a subject which puts fire into the bellies of the public. But at a time of growing nationalism in Scotland, it is not inconceivable that the current party of Government in Scotland might come to see in the project a means to celebrate and bolster national identity and legal culture. If Scottish independence were to be achieved in any future independence referendum, I suspect there would be a greater likelihood of codification of both the civil and criminal law. That is not to say that it is a project which unionists cannot also get behind: support or opposition for codification does not follow political lines.

Of course, national codification of private law is not the only way to improve a legal system. As discussed in this chapter, alternatives include greater European harmonisation or codification, national restatement, consolidation of existing statutory law, continued use of maxi-statutes, and step-by-step legislative development of areas of law which could, over time, develop into a sort of “code”. The realist (perhaps pessimist?) in me suspects that conservative inertia and more pressing governmental priorities will result only in the continuing use of maxi-statutes; that, at best, step-by-step codification (in a traditional British sense) will continue to be the means of ongoing reform of Scots law; and that the likelihood of a more sweeping codification of private law will remain (in the short term) slim.⁸⁰ Yet the dreamer in me wants to believe that something more is possible, and that a codification of private law which offers easy public access to concisely expressed, comprehensive legislative provisions, resting on a Scottish preference for clear legal principle and structures, ought to be the aspiration of our legal system.

⁸⁰ A view shared by others: see, eg, that of a current Scottish Law Commissioner, Professor H L MacQueen: ‘Reforming Third Party Rights in Scotland’ (to be published in a forthcoming Festschrift for Joachim Bonnell), who comments on the ‘the absence of any realistic prospect of a Scottish civil code, or even a contract code ...’. Professor MacQueen adds that Scottish law reformers ‘look only with envy’ at the systematic overviews of the law achievable in model Codes such as the PICC and DCFR, and the work being done on a new code of obligations in France.